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EXAMINER	
CHAWLA, JYOTI	
ART UNIT	PAPER NUMBER
1794	

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Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/539,149	DE LAAT ET AL.	
	Examiner	Art Unit	
	JYOTI CHAWLA	1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☐ Responsive to communication(s) filed on _____.

2a)☐ This action is **FINAL**. 2b)☒ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *1-8* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *1-8* is/are rejected.

7)☒ Claim(s) *1* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☒ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☒ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date *8/15/2006*.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Claims 1-8 are pending and examined in the application.

Claim Objections

Claims 1-8 are objected to because of the following informalities:
Claim 1 as recited includes the term "characterised in that" in the claims. Applicant is suggested to change the phraseology to a more accepted US term, such as "wherein" to clarify the meaning of the claim. Appropriate correction is required.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claim 4 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
A broad range or limitation together with a narrow range or limitation that falls within the broad range or limitation (in the same claim) is considered indefinite, since the resulting claim does not clearly set forth the metes and bounds of the patent protection desired. See MPEP § 2173.05(c). Note the explanation given by the Board of Patent Appeals and Interferences in *Ex parte Wu*, 10 USPQ2d 2031, 2033 (Bd. Pat. App. & Inter. 1989), as to where broad language is followed by "such as" and then narrow language. The Board stated that this can render a claim indefinite by raising a question or doubt as to whether the feature introduced by such language is (a) merely exemplary of the remainder of the claim, and therefore not required, or (b) a required feature of the claims. Note also, for example, the decisions of *Ex parte Steigewald*, 131 USPQ 74 (Bd. App. 1961); *Ex parte Hall*, 83 USPQ 38 (Bd. App. 1948); and *Ex parte Hasche*, 86 USPQ 481 (Bd. App. 1949). In the present instance, claim 4 recites the broad recitation

of "pH from 3.8 to 5.2" and the claim also recites "more preferred from 4.2 to 4.9" which is the narrower statement of the range/limitation.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

Determining the scope and contents of the prior art.

Ascertaining the differences between the prior art and the claims at issue.
Resolving the level of ordinary skill in the pertinent art.
Considering objective evidence present in the application indicating obviousness or nonobviousness.

This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

(A) Claim 1-8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Reckweg (WO 97/08956), in view of Merchant et al (US 6287625 B1), hereinafter Merchant.

Regarding claim 1, Reckweg teaches a water continuous (page 2, line 2), chemically acidified product comprising a fat (page 2, lines 2-3), less than 4.5 wt % of milk protein which falls in applicant's range of 0.1 to 15 wt % protein (Page 6, line 32), and having a pH from 4.0 to 5.2 (Page 5, lines 13-14) which falls within applicants' recited range of 3.5 to 5.5.

Regarding the specific acids as recited in claims 1, 2 , 3, 6 and 8, Reckweg teaches of cultured product wherein "at least part of the dairy ingredients having been subjected to the influence of acidulating microorganisms like lactic acid bacteria," which will produce lactic acid (a food grade acid) (Page 3, lines 6-10). Reckweg is silent regarding the specific amount of food grade acid and also regarding the addition of acetic acid but Reckweg teaches the acidity level, along with protein and fat level as recited in the composition. Further, acidification of water continuous products using acetic acid (vinegar) either alone or in combination with other food acids like citric acid and lactic acid was known in the art at the time of the invention. Merchant teaches of spreads and dressings comprising starch, vegetable oils, egg products, sweeteners and edible acids (Column 7, line 35 to line 60). The products of Merchant have a pH range of 3-5 (column 10, line 3 and Examples), which falls within applicant's recited range. Regarding the edible acids or food grade acids, Merchant teaches that vinegar, lime juice (comprising citric acid), acetic acid, lactic acid, citric acid and any combination of the edible acids. Thus, water continuous products with acidity in the range recited by the applicant were known at the time of the invention, as taught by Reckweg and Merchant. Further it was also known to use any combination of food grade acids including lactic acid, acetic acid, and citric acid in achieving the acidity in water continuous products, such as spreads and dressings, as taught by Merchant. Therefore, it would have been a matter of routine determination for one of ordinary skill in the art at the time of the invention to modify Reckweg and use a combination of food grade acids to acidify a water continuous product, in view of Merchant, based on the desired flavor of the finished product. One would have been motivated to do so depending on which

acidulating agents were more available and affordable at the time the invention was made.

Regarding the relative amount of acetic acid in claims 1 and 6, regarding the relative amount of citric acid in claim 6 and also regarding the amount of lactic acid as recited in claim 8, references are silent. However, both Reckweg and Merchant teach pH or acidity level in the recited range of the applicant. Thus, the total acid is in applicant's recited range in water continuous product was known. Further, regarding the edible acids or food grade acids, Merchant teaches that vinegar, lime juice (comprising citric acid), acetic acid, lactic acid, citric acid and any combination of the edible acids. Thus, applicant's recited acids were also known to be used in water continuous products. Regarding the relative ratios of the acids it would have been a matter of routine optimization experiment and thus would have been obvious to one of ordinary skill in art to use or combine Reckweg and Merchant in the range as claimed, because it has been held that where the general conditions of the claims are disclosed in the prior art, it is not inventive to discover the optimum or workable range by routine experimentation. See MPEP 2144.05.

Further, attention is invited to *In re Levin*, 84 USPQ 232 and the cases cited therein, which are considered in point in fact situation of the instant case. At page 234, the Court stated as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients, which produces a new, unexpected and useful function. In re Benjamin D. White, 17 C.C.P.A. (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

Regarding claim 4, Reckweg teaches a water continuous product with a pH in the range of 4.0 to 5.2 (Page 5, lines 13-14) which falls within applicants recited range of 3.8 to 5.2, more preferred from 4.2 to 4.9.
Note: applicant is also referred to rejection of claim 4 under 35 USC 112.

Regarding claim 5, Reckweg teaches of a water continuous product comprising less than 35 % fat (page 2, lines 3 and 15). Reckweg further teaches that "the product will contain more than 15% of fat (page 7, lines 24-25). Thus Reckweg's water continuous product comprises about 15-35% fat, which falls in applicant's recited range. Regarding the amount of fat as oil, Reckweg teaches 15-50% of the fat content is a vegetable fat and preferred vegetable fats include oils, such as, soybean oil, rapeseed oil, coconut oil (page 7, lines 5-21), which falls within applicants recited range for oil.

Regarding claim 7, Reckweg teaches of a water continuous product with fat content less than 35% (page 2, lines 3 and 15, page 7, lines 24-25), which falls in applicant's range of from 1 to 40 wt % fat. Reckweg's product further comprises less than 4.5 wt % of milk protein which falls in applicant's range of 0.1 to 10 wt % milk protein (Page 6, line 32). Regarding the amount of thickener Reckweg's product comprises from 0.5 to 2 wt% of gelatin (page 6, lines 9-12) which falls in applicant's recited range of 0.01 to 3 wt % thickener. Regarding the acidity Reckweg's product has a pH range of 4.0 to 5.2 (Page 5, lines 13-14) which falls within applicants recited range of a pH from 4.2 to 5.5. Therefore, Reckweg teaches of a water continuous product as recited in claim 7.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to JYOTI CHAWLA whose telephone number is (571)272-8212. The examiner can normally be reached on 9:00 am to 5:30 pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

JC
Examiner
Art Unit 1794

/KEITH D. HENDRICKS/
Supervisory Patent Examiner, Art Unit 1794